

# EXHIBIT 5

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SPECIAL MASTER

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL)  
ANTITRUST LITIGATION

**CASE NO. M:07-cv-01827-si**

**MDL No. 1819**

**SPECIAL MASTER'S ORDER RE  
HANNSTAR DISPLAY  
CORPORATION'S MOTION TO  
COMPEL BEST BUY TO RESPOND  
FURTHER TO DOCUMENT  
REQUEST NO. 45 (Hrg. 2/7/12)**

This Order Relates to:

ALL CASES

On February 7, 2012, I heard HannStar's motion to compel Best Buy to further respond to Request No. 45 of Defendants' Second Set of Requests for Production of Documents, by producing its settlement agreements with Samsung and any other non-defendant co-

1 conspirators.<sup>1</sup> On February 10, Best Buy served its post-hearing brief discussing cases cited in  
2 HannStar's reply brief. Having considered all arguments and evidence submitted, I now make  
3 the following Order.

#### 4 Factual Background

5 Best Buy filed its opt-out complaint in October 2010. A year later Defendants served  
6 their Second Request for Production of Documents that included a request (No. 45) for copies of  
7 all documents relating to settlements Best Buy had made with alleged co-conspirators who were  
8 not defendants in the Best Buy case. Best Buy objected that Fed. R. of Evid. 408 protects the  
9 confidentiality of settlement documents. Best Buy disclosed that it has settled only with  
10 Samsung, which joins Best Buy in objecting to disclosure of the settlement agreement and any  
11 related documents.

12 HannStar argues that the settlement agreements are relevant to enable it to determine the  
13 amount of offset to which it may be entitled against any judgment. It argues that the ability to  
14 "understand the scope of its potential liability in this case" is critical to enable HannStar (a) to  
15 make arguments regarding offset, (b) to evaluate its risks for purposes of settlement, and (c) to  
16 ascertain whether the agreements contain "cooperation" obligations that might show bias on the  
17 part of witnesses. [HannStar brief, dtd. 1/27/12, p. 5].

18 Best Buy counters that, while the settlement agreements will be liable after judgment to  
19 perform the "ministerial" act of calculating the offset, they are not relevant at this time. They  
20 further note that it has a duty pursuant to the agreement to keep it confidential and that Samsung  
21 joins in objecting to disclosure. They pointed out at the hearing that the agreements involve not  
22 only an exchange of cash, but "future obligations" by both parties that are competitively  
23 sensitive.

#### 24 Analysis

25 Discoverability of the settlement agreements turns first on whether they are relevant for  
26 discovery purposes.<sup>2</sup> Fed. R. Civ. Proc. 26(b)(1) provides for discovery of information that is

27 <sup>1</sup>The motion originally sought to compel Best Buy also to respond to Request No. 46 and Interrogatory No. 23  
28 relating to net purchase and sale prices and profit margins. At the hearing counsel asked that I defer ruling on these  
requests to permit further meet-and-confer.

<sup>2</sup> Both sides agree that the agreements are unlikely to be admissible (Fed. R. Evid 408).

1 “relevant to any party’s claim or defense,” of information that is relevant to the subject matter of  
2 the action but only for good cause, and of information that is not admissible if it “appears  
3 reasonably calculated to lead to the discovery of admissible evidence.” There is no showing here  
4 that Best Buy’s settlement agreements and negotiations would be relevant to its claims or  
5 HannStar’s defenses. This distinguishes this situation from some cases that have allowed  
6 discovery of settlement agreements in part because they shed light on some claim or defense.<sup>3</sup>  
7 However, the Best Buy agreements plainly do relate to the subject matter of the case, which  
8 requires an assessment of whether “good cause” exists for their production.

9 After relevance, the second consideration is whether any other rule or policy demands  
10 protection of the information. In this respect, Best Buy’s reliance on the confidentiality  
11 provisions in the settlement agreement is not controlling. While the parties’ desire for  
12 confidentiality is entitled to due respect, and may enhance the prospect for future settlements, it  
13 is clear that a court may order discovery notwithstanding such confidentiality provisions. *In re*  
14 *Enron Corp. Securities, Derivative and ERISA Litigation*, 623 F.Supp.2d 798, 838 (S.D. Tex.  
15 2009). Nor does Rule 408 prevent discovery, since its reach extends only to admissibility of  
16 evidence, not to disclosure. *Johnson Matthey, ibid.* at fn. 3.

17 Case law cited by the parties is divided on whether settlement agreements should be  
18 produced to non-settling parties prior to judgment. Cases approving disclosure generally  
19 conclude that disclosure of settlement agreements will enhance the prospect of further  
20 settlements and will not unduly prejudice the settling parties. The leading case favoring  
21 disclosure seems to be *Bennett v. La Pere, ibid.* at fn. 3. In that medical malpractice case, as is  
22 true here, the amount of the plaintiffs’ settlement with defendant physicians would reduce the  
23 amount recoverable from the non-settling hospital. The court concluded that in fairness the  
24 hospital needed to know the amount of its potential liability in order to evaluate possible  
25 settlement, and that plaintiffs’ argument that they would be disadvantaged in future negotiations

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27 <sup>3</sup>*Bennet v. La Pere*, 112 F.R.D. 136 (D.R.I. 1986) [scope of release in settlement agreement potentially relevant to  
28 liability of non-settling joint tortfeasor]; *Johnson Matthey, Inc. v. Research Corp.* 2003 WL 24136087, at \*2-3  
(S.D.N.Y. June 16, 2003) [potentially relevant in patent case to determination of a reasonable royalty]; *Del Monte*  
*Fresh Produce B.V. v. Ace Amer. Ins. Co.*, 2002 WL 34702176, at \*3 (S.D. Fla. September 4, 2002) [relevant to  
determine whether primary policy limits were exhausted].

1 with the hospital was mere gamesmanship. The *Bennett* court rejected the analysis in *Bottaro v.*  
2 *Hatton Assoc.*, 96 F.R.D. 158 (E.D.N.Y. 1982), which had concluded that, given the Rule 408  
3 bar on the admissibility of settlement agreements, a showing was needed that discovery would  
4 lead to the disclosure of admissible evidence. 96 F.R.D. at 160. *Bennett* ruled, correctly I think,  
5 that Rule 26(b)(1) permits discovery of evidence relevant to the subject matter of the action for  
6 “good cause,” apart from whether it will lead to discovery of admissible evidence. 112 F.R.D. at  
7 139-140.

8 A difficulty with producing the Best Buy-Samsung agreement, which was not present in  
9 any of the other cited cases, is that Best Buy represents that the terms include obligations in  
10 future business transactions, which are highly confidential. However, one could deal with that  
11 by limiting disclosure to attorneys only pursuant to the Protective Order in these MDL cases.

12 On balance, I conclude that good cause exists for producing the Best Buy settlement  
13 agreements. The analysis and factors relied on by the *Bennett* court – that fairness and the  
14 desirability of promoting settlements will be enhanced if non-settling defendants are able to  
15 calculate the amount of offsets and, hence, their potential liability – outweigh any hypothetical  
16 disadvantage to Best Buy in future negotiations. The confidentiality of any business terms in the  
17 settlement can be protected by making the disclosure Attorneys’ Eyes Only. And finally, when  
18 in doubt and absent a convincing show of prejudice, the scales of discovery must tip in favor of  
19 transparency and full disclosure. For these reasons I conclude that HannStar’s motion should be  
20 granted.

### 21 Order

22 Good cause appearing, it is ORDERED that HannStar’s motion to compel as to Request  
23 for Production No. 45 is GRANTED to this extent. Best Buy shall produce within five business  
24 days its settlement agreements with any alleged co-conspirators who are non-parties to the Best  
25 Buy case. The agreements shall be produced pursuant to the Highly Confidential requirements  
26 of the Stipulated Protected Order in this case, except that they shall be disclosed only to outside  
27 counsel of record in this action and to the Court and its personnel. Best Buy need not produce  
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1 documents relating to its negotiations and settlement other than the executed settlement  
2 agreements themselves.

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4 Dated: February 15, 2012

A handwritten signature in dark ink, appearing to read 'Martin Quinn', is written over a horizontal line.

Martin Quinn, Special Master